



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

May 19, 2006

In the Matter of
Richard Egan /
Crosby Yacht Yard Inc.

Docket No. 2006-050
File No. SE-3-4411
Barnstable

RECOMMENDED FINAL DECISION

This matter concerns a Superseding Order of Conditions (SOC) issued under the Wetlands Protection Act for reconstructing a pier and dredging approximately 830 cubic yards of material proximate to the proposed pier.¹ A Notice of Claim for an adjudicatory hearing was filed by the petitioner, Oyster Harbors Marine Inc. and Oyster Harbors Yacht Basin Realty Corp (collectively, Oyster Harbors, or petitioner) the owner and long-term lessee respectively of land abutting the project site. The Oyster Harbors property includes an existing pier maintained by the petitioner.

The petitioner moved to dismiss this appeal for failure to state a claim upon which relief can be granted under 310 CMR 1.01(11)(d)2 and MassDEP concurred with the motion. The motion contends that all of the claims raised by the petitioner arise under the Public Waterfront

¹ The SOC also permits removal of the remnants of a timber platform/ pier/travel lift, marine railway and a small wood shed, construction of a steel sheet pile bulkhead, a two foot wide timber boardwalk, installation of vinyl/steel sheeting and the extension of a paved drive with drainage improvements. SOC, page 1.

Act, M.G.L. c. 91 and its implementing regulations, and this appeal of the SOC under the Wetlands Protection Act cannot result in a Final Order granting the relief requested. I find the petitioner's Chapter 91 concerns are not properly addressed in this wetlands permit appeal, and that the petitioner's concerns with excessive boat idling, increased risk of boating collisions creating debris, and temporary sheltering of boats in the salt marsh, fail to articulate any adverse impact to a wetlands resource area from the pier approved in the SOC. I therefore recommend granting the applicant's motion.

The petitioner's concerns with Chapter 91 compliance are plainly central to its objections set out in the Notice of Claim. The appeal was lodged in order to "protect [the petitioner's] longstanding use of the Oyster Harbor pier pursuant to its Chapter 91 license." Notice of Claim p. 4. The construction of the proposed pier by the applicant, and associated dredging will, according to the Notice of Claim, interfere with the petitioner's ability to use its own (Oyster Harbors) licensed pier. Because the dredging permitted by the SOC will allow boats to be docked at the applicant's reconstructed pier in a location where that was not previously possible, the petitioner contends the project will interfere with boats docking at the petitioner's pier and more generally its rights arising from that pier's Chapter 91 license.

The petitioner also asserts an assortment of violations of Chapter 91 associated with the applicant's pier, all of which it argues should prevent the issuance of the Wetlands SOC². These alleged Chapter 91 violations cannot be endorsed through issuance of the SOC, argues the

² The petitioner disputes the validity of the applicant's license for the pier, claims the applicant's proposal to reconstruct the pier violates Chapter 91 by allowing the pier within 25 feet of the shared property line, claims interference with the petitioner's own legal rights under Chapter 91, and that unsafe navigational practices will result. The petitioner also argues that the reconstructed pier cannot be allowed as a "minor modification" under 310 CMR 9.00 as it will not be in the authorized footprint of the licensed structure, nor maintenance and repair activity under 310 CMR 9.22 as the dredging anticipates a change in use. Notice of Claim, p. 5-7. These allegations of noncompliance go to both the applicant's pier as licensed (which no longer exists), the pier to be reconstructed as described in the SOC, as well as the petitioner's rights established in the license for its own pier.

petitioner, as the Wetlands Protection Act states; “If the department of environmental protection finds that any proposed work would violate the provisions of chapter ninety-one, it shall proceed immediately to enforce the provisions of said chapter.” M.G.L. c. 131, §40, ¶23. The petitioner also points to 310 CMR 10.24(4) which provides:

A proposed project must comply with all applicable requirements of other federal, state and local statutes and by-laws, in addition to meeting the requirements of 310 CMR 10.00. Examples of such laws which may be applicable are ... the Waterways laws (M.G.L.c. 91).³

Petitioner maintains these provisions incorporate by reference the substantive standards of other environmental laws – and specifically Chapter 91 – as requirements for permitting under the Wetlands Protection Act. Claim, p. 4-5. Because the project does not comply with all applicable laws (and in particular Chapter 91) the Claim asserts the SOC does not contribute to the protection of the interests of the Act and is inconsistent with the wetlands regulations. Claim, p. 4.

The applicant’s Motion to Dismiss casts all of the petitioner’s claims as originating in Chapter 91, and recites the principle that subject matter jurisdiction in a wetlands permit appeal is limited to claims arising out of the Wetlands Protection Act and its regulations, and argues that all of the petitioner’s claims fall outside the scope of that statute. In support, the applicant cites the following passage concerning the review of a wetlands permit.

...subject matter jurisdiction is confined to the adjudication of claims arising out of the Wetlands Protection Act and regulations. To be adjudicable, therefore, a claim must be related to a project’s alleged adverse impacts upon wetland resource areas and the functions that they perform.

³ General condition number 3 included in the SOC restates this principle: “This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state or local statutes, ordinances, bylaws, or regulations.”

Matter of Northpoint Realty Development Corp. et al, Docket No. 2001-064, Ruling on Motion to Dismiss Issues (February 27, 2002). Because none of the petitioner's issues can be resolved as part of this Wetlands appeal, the petitioner argues that the appeal should be dismissed pursuant to 310 CMR 1.01(11)(d)2.

The standard for granting the motion is summarized as follows:

In an appeal challenging a DEP permit or license, this type of dismissal is visited appropriately upon legally insufficient claims – claims that raise issues and seek relief beyond the four corners of the governing statute or regulations, claims seeking relief that the adjudicatory forum has no power to grant, and claims of abstract, conjectural or speculative injury or impact. All these are jurisdictional defects.

Matter of Roseland Property Company, Docket No. 2003-177 Recommended Final Decision (April 14, 2004) Adopted by Final Decision (April 22, 2004), Reconsideration Denied (June 1, 2004) (citations omitted). A motion to dismiss for failure to state a claim challenges the legal sufficiency of the appeal, and in deciding the motion I must presume all facts alleged in the petitioner's Claim to be true. In the Matter of Edward Lawson, Docket No. 2000-111, Recommended Final Decision (February 2, 2001) Adopted by Final Decision (February 7, 2001), 310 CMR 1.01(11)(d)2. Ordinarily a combination of alleged wetlands impacts and a claim for relief of the type that is available in a wetlands permit appeal suffices to defeat a motion to dismiss claiming legal insufficiency, however, any alleged wetland impacts must not be so abstract, conjectural or speculative that their truth cannot be assumed. Matter of Symes, Docket No. 2002-45, Decision and Order on Motion to Dismiss (April 18, 2002).

Although the petitioner acknowledges that its concerns are focused on matters governed by Chapter 91, the petitioner's Claim and its Response to the Motion to Dismiss assert that the wetlands regulatory scheme incorporates those standards by reference, as well as other general environmental requirements. The applicant disagrees and interprets the language of 310 CMR

10.24(4) regarding compliance with other applicable local, state and federal requirements as a reminder that other laws apply, but does not permit “a WPA appeal to take evidence and resolve issues of concern” originating in those other requirements. Motion to Dismiss, p. 5. The Department adds that the regulatory provision is meant to be advisory: a signal that the SOC is not to be “construed by permittee as a ‘carte blanche’ but rather as permission related solely to wetlands and to those values authorized to be protected under the Act and the Regulations.” MassDEP Response, p. 4.

Prior cases support the interpretation of 310 CMR 10.24(4) presented by the applicant and MassDEP limiting the scope of review available in a wetlands permit appeal. Just as the petitioner has argued here, the petitioner in Matter of Massachusetts Highway Department, argued that a similar regulatory provision in the Chapter 91 regulations concerning compliance with other statutes incorporated the substantive standards of those laws into the licensing standards. Matter of Massachusetts Highway Department, Docket No. 94-072, Decision and Order on Motion to Dismiss (December 23, 1994). The Administrative Law Judge in dismissing the issue, explained:

A number of environmental regulations contain language to ensure that they not be read to suggest that compliance with any one statute obviates the need to comply with others. While the inclusion of a specific list of environmental statutes with which compliance is mandated – as is found at 310 CMR 9.33 – is unusual, it cannot be interpreted as requiring the Department to conduct an independent and duplicative review under those other environmental laws within the context of the Chapter 91 review process.

Id. The same principle applies to the other local, state and regulatory requirements referenced in the wetlands regulations at 310 CMR 10.24(4). “The issuance of a positive Superseding Order of Conditions reflects the Department’s conclusion that a project is in compliance with the wetlands regulations; it does not in itself, signify compliance with other state and federal requirements which may apply...” Matter of William G. Barbrick, Docket No. 93-051, Final

Decision (December 8, 1994) quoting Matter of Archdiocese of Boston, Docket No. 91-14, Final Decision (November 19, 1992) [claim that SOC review should include review of substantive standards from FEMA's National Flood Insurance Program or the Army Corps of Engineers standards under 310 CMR 10.24(4) rejected]. More directly analogous to this case, the petitioner in Matter of William Nelson raised issues with regard to the project's compliance (or noncompliance) with Chapter 91, in the appeal of an SOC. Matter of William Nelson, Docket No.s 98-038, 98-064, Ruling on Motion to Dismiss and Order (December 15, 1998). After considering the meaning and effect of 310 CMR 10.24(4) on issues arising under Chapter 91, those issues were dismissed from the appeal as not properly raised in that administrative forum and beyond the scope of the wetlands appeal. Id. See also Matter of W.J.G. Realty Trust, Docket No. 2002-145, Recommended Final Decision (April 22, 2003), Adopted by Final Decision (May 12, 2003), Reconsideration Denied (July 25, 2003) [argument that Chapter 91 applies to project, and request for independent, substantive review of an environmental concern unrelated to the wetlands protection act and regulations did not state a claim for relief in appeal of SOC].

The petitioner's assertions that Chapter 91 standards, including the 25-foot property line setback and those assuring navigational safety of jurisdictional waterways, should be applied by the Department in issuing the SOC do not state a claim under the Wetlands Protection Act.

As to the petitioner's claims of improprieties in the applicant's final Chapter 91 license, non-compliance with that license, and incorrect interpretations of its scope or the scope of proposed changes through "minor modification" by MassDEP, I consider all to be requests for enforcement or reconsideration of those interpretations. The propriety of the Department's Chapter 91 licensing determinations are matters beyond the scope of the determination made by

the SOC under the Wetlands Protection Act and therefore beyond the scope of this permit appeal. Considering the petitioner's request as a plea for enforcement action, and assuming the violations alleged by the petitioner as true, undertaking enforcement is within the Department's discretion and expertise, and does not imply a right to an adjudicatory hearing. Matter of Luongo, Docket No. 98-053, Final Decision (March 4, 1999). See also Matter of Sandra Lepore, Docket No. 2003-092, 2003-093, Recommended Final Decision (September 2, 2004) Adopted by Final Decision (December 3, 2004) [claim dismissed in SOC appeal seeking to compel Title 5 enforcement for existing septic system unrelated to work proposed in wetlands]. To the extent the petitioner's Claim requests Chapter 91 enforcement proceedings by the Department, any such action is discretionary to the agency and beyond the scope of this SOC permit appeal.

Finally, the petitioner's Claim states the project will "have an impact on the environmental interests protected by the WPA by creating overlapping use of the protected resource and creating additional risks to protected resource area through unsafe boat maneuvering." Claim, p. 5-6. Its Response in Opposition to the Motion to Dismiss adds that "inadequate separation" between the two piers "is a wetlands issue" because "If boats are required to make unsafe maneuvers in the area where the two projects conflict, then boats are more likely to idle excessively, to come into contact and discharge hull materials into the waterway, and to seek temporary shelter in the very salt marsh areas sought to be protected." Response in Opposition to Motion to Dismiss, p. 5.

Taking petitioner's allegations as true, the project will require more challenging marine maneuvering in the area between the two piers. The consequences of such maneuvering, specifically an increased likelihood of excessive idling, risk of boating collisions with resulting

debris on the water surface and the possibility of temporary sheltering in the salt marsh are the foreseen by the petitioner.

No further explanation of the nature of any specific alteration to or adverse impact upon the resource area in question is provided by the petitioner, nor is any claim articulated that an applicable wetlands performance standard will not be met. I find no clear assertion of adverse impact to the wetland resource areas in the Claim from the project. A higher probability of difficult navigation around the pier, and a higher risk of boating collisions, without specific allegations of harm to the wetlands resources or their functions does not state a wetlands claim. A claim must relate “to the project’s alleged impacts upon wetlands resource areas and the functions they perform.” Matter of Northpoint Realty Development Corp. et al, Docket No. 2001-064, Ruling on Motion to Dismiss Issues (February 27, 2002). Further, impacts or injuries to wetlands resource areas from the project that are abstract, conjectural or speculative are subject to dismissal for failure to state a claim. Matter of Roseland Property Company, Docket No. 2003-177 Recommended Final Decision (April 14, 2004) Adopted by Final Decision (April 22, 2004), Reconsideration Denied (June 1, 2004); Matter of John J. Gormally Jr., Docket No. 2003-037, Recommended Final Decision (November 4, 2003) Adopted by Final Decision (November 19, 2003); Matter of Town of Falmouth Department of Public Works, Docket No. 93-032, Decision and Order on Motion to Dismiss (September 2, 1994) [dismissing claim that cars driven along public way would crash, careening off the road into a wetland thereby resulting in alteration]. As the petitioner has not alleged a direct adverse impact on a wetlands resource area or its functions resulting from the project, it fails to state a claim arising from the project and the resulting new navigational challenges.

I recommend that the petitioner's motion be granted and this appeal be dismissed for Failure to State a Claim Upon Which Relief can be Granted under the Wetlands Protection Act and 310 CMR 1.01(11(d)(2), and 1.01(5)(a)15.f.v.

NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, Jr., May 23, 2006.